Spain's human rights and refugee law obligations vis-à-vis those it intercepts at sea pursuant to the Spanish-Cape Verdean bilateral agreement and during FRONTEX operations

University of Oslo

Faculty of Law

Candidate number: 8028

Supervisor: Øyvind Dybvik Øyen

Deadline for submission: December 01, 2010

Number of words: 17,855 (max. 18.000)

22.11.2010

TABLE OF CONTENTS

Acknowledgement

I wish to express my appreciation to my supervisor Øyvind Dybvik Øyen who read drafts of this thesis and provided insightful comments. I am also very grateful for Lara Wik's and Nobuo Hayashi's support and the assistance of the staff and librarians at the Faculty of Law of the University of Oslo.

Dedication

I dedicate this work to my family.

CHAPTER ONE

General Overview of the Study

1.1 Research question

The Member States of the European Union (EU) have developed various means of preventing irregular migration. Those Member States along the Mediterranean coast find themselves under increasing pressure to control immigration effectively. In response, they have begun externalising their border controls and, in cooperation with European Union Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), intercepting and repatriating migrants caught at sea. EU Member States, including Spain, have entered into bilateral agreements with African states such as Cape Verde in order to enter and conduct interception operations in the latter's territorial waters.

Is Spain duty-bound and, if so, to what extent is it duty-bound to extend human rights and refugee law protection to those it intercepts at sea pursuant to the Spanish-Cape Verdean bilateral agreement and during FRONTEX operations? This thesis will explore Spain's practice and the law concerning interceptions on the high seas and in the territorial waters of Cape Verde. What are Spain's duties, if any, during these operations? The thesis will discuss the extraterritorialisation of jurisdiction and argue that Spain does indeed have jurisdiction and duties, including those concerning human rights and non-refoulement, towards persons it intercepts at sea.

1.2 Objective of the study

The objective of this study is to analyse Spain's interception according to the relevant law and examine Spain's international duties towards the intercepted.

1.3 Methodology and sources

This study approaches the research question on the basis of State practice and the applicable law. Legal sources such as the bilateral agreement between Spain and Cape Verde, relevant treaty provisions, judicial decisions and scholarly writings are used for this thesis. These sources are treated and interpreted according to Article 38 of the Statute of the International Court of Justice (ICJ) and according to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT).

The term "jurisdiction" has different meaning in the legal literature. Therefore, the thesis will specify the sense in which the term "jurisdiction" is used in order to avoid misunderstandings.

1.4 Structure

This thesis explores the law concerning Spanish interception operations carried out on the high seas and in the territorial waters of Cape Verde. At issue here is the bilateral agreement concluded between the two States as well as the international legal framework under which these states act. The thesis will argue that Spain impermissibly aims to reduce its international obligations and that it remains duty-bound to accord human rights and refugee law protection to those it intercepts.

The thesis begins with an overview of Spain's interception practice. It will be shown that Spain has sought to construe the nature and scope of its international obligations narrowly.

The thesis also examines extraterritoriality, a notion that is integral when ascertaining the range of a State's responsibility *vis-à-vis* persons it intercepts. This is a complex issue in the context of maritime interception operations because the law of the sea and the question of jurisdiction have to be taken into account. Moreover, Spain has requested and received help for some of its operations from FRONTEX. Accordingly, the latter's role and possible responsibility become relevant as well.

The thesis then investigates human rights issues during interception operations. In particular, it considers the extent to which Spain is bound by its human rights obligations when acting on the high seas and in Cape Verde's territorial waters. The right to seek asylum will receive special focus.

This will be followed by an in-depth conceptual and legal analysis of interception itself. Specifically, the thesis will address questions such as: is Spain bound by the principle of non-refoulement in respect of those it intercepts? Is Spain obligated to rescue people who

cross the sea in their attempt to reach Europe? What kind of enforcement measures can Spanish and FRONTEX agents lawfully execute during their operations, and under what circumstances can they execute them?

CHAPTER TWO

Spain's Practice

2.1 Immigrants at the southern border of the European Union

Spain is one of the main destinations of irregular immigrants from West African countries. They have been numerous. There were 39,180 irregular immigrants in 2006; 18,056 in 2007; 13,425 in 2008; and 7,285 in 2009.[1]

This situation has led Spain to adopt new political strategies beyond traditional border controls. Among the most controversial means of border control are joint sea patrol operations within the territorial waters of third countries. Spain's aim is to prevent the departure of irregular immigrants. Spain has entered into bilateral agreements with countries such as Cape Verde which entitles the former to exercise this kind of border control in the latter's territorial waters.

In addition, Spain combats the smuggling of immigrants on the high seas by criminalising the activities according to the 2000 Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air.[2] Thus, Spanish courts may try the skippers of vessels intercepted on the high seas for the crime of smuggling of immigrants, even before stepping onto Spanish soil.[3]

2.2 Border control at Spain's territorial waters

According to the United Nations Convention on the Law of the Sea (UNCLOS)[4] of 10 December 1982, land territory, internal waters and territorial sea (in case of a costal State)

---

[1] Spanish Ministry of the Interior, "Balance de la lucha contra la immigración illegal 2007," 9 January 2008, http://www.mir.es/DGRIS/Balances/; ibid., "Balance de la lucha contra la immigración illegal 2008," 12 January 2009, http://www.mir.es/DGRIS/Balances/.

[2] Art. 2 and 6, Protocol against the Smuggling of Migrants by Land, Sea and Air (hereinafter Palermo Protocol), supplementing the United Nations Convention against Transnational Organised Crime; adopted in New York on 15 November 2000; entered into force on 28 January 2004; ratified by Cape Verde on 15 July 2004; and ratified by Spain on 1 March 2002.

[3] Bernard Ryan and Valsamis Mitsilegas eds., Extraterritorial Immigration Control (Martinus Nijhoff Publishers 2010), p. 312.

[4] UNCLOS entered into force on 16 November 1994; signed by Spain on 4 December 1984 and ratified on 15 January 1997; signed by Cape Verde on 10 December 1982 and ratified on 10 August 1987.

belong to a State's sovereign territory.[5] This means that a State exercises territorial jurisdiction over these areas. The territorial sea has a limitation not to exceed 12 nautical miles measured from baselines.[6] Territorial sea does not raise legal problems for immigration control since this zone falls under the State's sovereignty.[7]

According to the UNCLOS, the same can be said of the contiguous zone, which extends up to no more than 24 nautical miles from the same baseline.[8] In this zone the Spanish authorities are entitled to adopt the necessary measures to exercise border control including the enforcement of Spain's immigration laws and regulations.[9]

2.3 High seas

Spain may intercept irregular immigrants on the high seas either on the basis of the Palermo Protocol or if the ship on which they travel is without nationality. Every ship enjoys the freedom of navigation on the high seas and is subject to the exclusive jurisdiction of its flag State.[10] There is an exception to this exclusive jurisdiction, e.g., when the ship is without nationality.[11] The Palermo Protocol permits the interception of vessels on the high seas suspected of transporting would-be migrants. In cases of a ship flying the flag of the interdicting State, the latter enjoys exclusive jurisdiction over the ship and may request the necessary assistance from other States parties.[12] If the ship is flying the flag of another State party, the interdicting State shall request authorisation from the flag State to take appropriate measures with regard to that vessel.[13] If the vessel has no nationality, it will not benefit from the freedom of navigation, and so the intercepting State has the right of unilateral intervention.[14]

The "patera" and "cayuco" (vessels often used by African migrants to reach Spanish coasts) are likely to be included within the category of vessels with no nationality. They can therefore be intercepted under the Palermo Protocol and the UNCLOS.[15] Given their size and

[5] Art. 2(1), UNCLOS.
[6] Art. 3, UNCLOS.
[7] Art. 2(1), UNCLOS.
[8] Art. 33(2), UNCLOS.
[9] Bernard Ryan, supra fn. 3, at p. 314.
[10] Arts. 87(1)(a) and 92(1), UNCLOS.
[11] Art. 110(1)(d), UNCLOS.
[12] Art. 8(1), Palermo Protocol.
[13] Art. 8(2), Palermo Protocol.
[14] Art. 8(7), Palermo Protocol; and Art. 110(1)(d), UNCLOS.
[15] Bernard Ryan, supra fn. 3, at p. 315.

state, these boats cannot be used on the high seas and therefore called "ships."[16] The mere existence of these boats would generate a rescue obligation which must be fulfilled irrespective of the legal nature of the waters where they are located. This also gives Spain the possibility to stop vessels with irregular migrants.[17]

2.4 Cape Verde's territorial waters - bilateral agreements

Spain has also concluded bilateral agreements on sea border surveillance in order to reach the starting point of irregular migrants. Spain has entered into agreements with Senegal and Mauritania (2006); Cape Verde (2007); and The Gambia, Guinea and Guinea Bissau (2008). It should be noted that these agreements other than that with Cape Verde have not been published. This lack of public access to the text of the arrangements hinders democratic control, transparency and scrutiny of their compatibility with international law.[18]

Because of States' exclusive sovereignty over their territorial seas, Spain may exercise control or interdiction activities on other States' territorial seas only if the costal State permits it. Therefore, the bilateral agreement with Cape Verde is the basis for Spain to perform surveillance and interception activities in the territorial waters of Cape Verde.

Spain claims that border control is performed by Cape Verdean agents and inside the latter's jurisdiction. Spain is therefore able to free itself from its international duties regarding human rights when conducting migration controls in foreign territorial waters.[19]

As mentioned earlier, there is one exception to the unpublished bilateral agreements, namely that between Spain and Cape Verde "on the Joint Surveillance of Maritime Spaces under Cape Verde's Sovereignty and Jurisdiction."[20] The two parties to this agreement set the conditions for deploying joint patrol in Cape Verdean waters in order to fight against different

---

[16] Ibid.
[17] Ibid., pp. 314-315.
[18] Ibid., p. 320.
[19] Thomas Gammeltoft-Hansen, The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean (DIIS Working Paper no. 6, March 2008), p. 19 http://www.diis.dk/graphics/Publications/WP2008/WP08-6_Refugee_Sovereign_Sea_EU%20Interdiction_Policies_Mediterranean.pdf and also Bernard Ryan, supra fn. 3, at p. 323.
[20] Boletín oficial del Estado (BOE) of 5 June 2009, no 136. This agreement was signed in February 2008 and entered into force in April 2009; original title: Acuerdo entre el Reino de España y la República de Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, hecho en Praia el 21 de febrero de 2008 (hereinafter "Spanish-Cape Verdean bilateral agreement"); unofficial translation by the author.

forms of organised crime, especially drug trafficking, the arms trade and "illegal emigration."[21]

According to the agreement, there are either Cape Verdean vessels or aircraft with Spanish personnel on board, or Spanish vessels or aircraft with "effective and mandatory presence of Cape Verdean personnel" on board.[22] This means that at least one member of the Cape Verdean Coast Guard should always be on board the Spanish vessels or aircraft[23] and that control, visit or arrest interventions should only be carried out by the Cape Verdean authorities or under their command.[24] The agreement addresses responsibility issues as well: each party shall account for the actions carried out during joint surveillance missions "within the limits of its responsibilities."[25] This provision therefore does not exclude the possibility of Spanish responsibility for human rights violations.[26] Also, according to Article 12, the provisions of the agreement shall be without prejudice to the rights and obligations of the parties arising from international treaties or conventions. This means that Spain is still bound by human rights obligations arising from conventions.

[21] Preamble, Spanish-Cape Verdean bilateral agreement.
[22] Art. 3, Spanish-Cape Verdean bilateral agreement.
[23] Art. 6.(4), Spanish-Cape Verdean bilateral agreement.
[24] Art. 6.(5), Spanish-Cape Verdean bilateral agreement.
[25] Art. 8, Spanish-Cape Verdean bilateral agreement.
[26] Bernard Ryan, supra fn. 3, at pp. 324-325.

CHAPTER THREE

Extraterritorial Jurisdiction

3.1 Jurisdiction, authority, responsibility

In order to consider whether Spain has jurisdiction, authority and/or responsibility over those intercepted in the territorial waters of Cape Verde, these legal expressions must first be examined and clarified.

3.1.1 Jurisdiction

3.1.1.1 Definition and types of jurisdiction

The fact that there are several definitions of jurisdiction used by international lawyers shows the diversity and the controversiality of this field of law. According to one commentator, "jurisdiction is the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs."[27]

The public international law literature specifies three types of jurisdiction. When adopting laws, the State uses its sovereign power to "juris-dicere," i.e., it exercises prescriptive jurisdiction (also called legislative jurisdiction). Enforcement jurisdiction means the power of the State to ensure through coercive means that legal commands and entitlements are complied with[28] (also called executive jurisdiction). Finally, adjudicatory jurisdiction means the power of the State to settle legal disputes through binding decisions or to interpret the law with binding force for all the persons and entities concerned[29] (also called judicial jurisdiction).

3.1.1.2 Bases of jurisdiction

[27] Malcolm N. Shaw, International Law (Cambridge University Press, sixth edition 2008), p. 645.
[28] Antonio Cassese, International Law (Oxford University Press, second edition, 2005), p. 49.
[29] Ibid.

As noted earlier, there are three types of jurisdiction: legislative, executive and judicial.

According to public international law, States may exercise jurisdiction on five grounds. These grounds depend on the domestic system of the State and, although it has to be consistent with international law, jurisdiction does not have to be based upon all of them.[30] These five grounds are: territoriality, nationality, passive personality, national security and universality.

Of interest to this thesis is executive jurisdiction because the activity at issue here, i.e., interception, is executive in nature. This kind of jurisdiction can be based upon two grounds. One of them is the territoriality principle.[31] This principle does not entitle one State to exercise jurisdiction in the territory of another State unless the latter authorises the former to do so (usually based on an agreement between them). The other is the universality principle.[32]

3.1.1.3 Where does extraterritoriality come in?

The term "extraterritorial" refers to the idea that the State exercises jurisdiction without territorial link. Therefore, "extraterritorial jurisdiction" accurately describes jurisdiction exercised over persons, property or activities without any territorial nexus.[33]

Nevertheless, "extraterritorial jurisdiction" is an unfortunate abbreviation because extraterritorial jurisdiction is neither a type of jurisdiction nor a basis for jurisdiction. It rather reflects the fact that a State acts outside of its territory: extra-territory. It would be more precise to say that enforcement jurisdiction is exercised extraterritorially. In any event, the expression "extraterritorial jurisdiction" is used in legal literature as well as in this study. In cases where a State exercises enforcement jurisdiction extraterritorially, another State often also has territorially based enforcement jurisdiction over these acts at the same time. This is called the collision of different jurisdictions.

In Cape Verdean territorial waters, Spain acts extraterritorially while Cape Verde has territorial jurisdiction. On the high seas, the flag State has exclusive jurisdiction over its

[30] Malcolm N. Shaw, supra fn. 27, at p. 652.
[31] The territorial basis for jurisdiction refers to the right of the State to exercise its sovereign rights on its own territory without limitation. This means that a country should be able to legislate, execute and adjudicate within its borders.
[32] Under the universality principle, every State has jurisdiction over particular crimes. It does so because these crimes are considered particularly offensive to the international community as a whole. The universality principle also means that a State has jurisdiction over these crimes whether or not it also has jurisdiction based or any other ground(s).
[33] Cedric Ryngaert, Jurisdiction in International Law (Oxford University Press, 2008), p. 7.

vessels,[34] and only on the basis of a legal entitlement (e.g., right to visit according to the UNCLOS or bilateral agreements with the flag States) may Spain exercise extraterritorial enforcement jurisdiction over such vessels.

3.1.2 Authority

This thesis has so far examined jurisdiction from a public international law point of view. However, the term "jurisdiction" can have a different meaning and content in the field of human rights law. In human rights, jurisdiction is connected to the terms "authority" or "power."

A State can have authority or power over persons without jurisdiction in the public international law sense. Therefore, human rights law and human rights lawyers tend to use the term "authority" rather than "jurisdiction." When they use the term "jurisdiction," they tend to mean "authority." They do so because States try to avoid responsibility when it comes to the application of human rights law outside of their territory. For example, the United States has sought to deny its own jurisdiction over Guantanamo (although the Supreme Court accepted the jurisdiction of US courts afterwards[35]) since Guantanamo is not a United States territory but lies instead within Cuba's sovereignty. Therefore, in human rights, the term "authority" is used when States use their power both lawfully and unlawfully, so that they cannot avoid responsibility for their acts.

Elsewhere, the European Court of Human Rights (hereinafter ECtHR) has stated that "jurisdiction" within the meaning of Article 1 of the ECHR[36] covers acts, lawful or unlawful, carried out by State agents or under State authority. The Court also held that "a State Party is not allowed to perpetrate violations of the Convention [ECHR] on the territory of another State, which it could not perpetrate on its own territory."[37] In other words, in cases where the State agent acts inside another State, whether unlawfully or lawfully (for example following agreement between those States), the State of the agent has "authority" and therefore also "jurisdiction" (in the human rights sense) over those whose human rights have been violated.[38]

---

[34] Art. 92, UNCLOS.
[35] Rasul v. Bush 542 USSC 466 (2004), p. 485; and Hamdan v. Rumsfeld 548 USSC 557 (2006), p. 584.
[36] European Convention on Human Rights (hereinafter ECHR) entered into force on 3 September 1953; Spain ratified it on 4 October 1979; the convention entered into force for Spain on the same day.
[37] Issa and Others v. Turkey (App. No. 31821/96), judgment (Second Section) of 16 November 2004 ECtHR, para. 71.
[38] Ibid.

Therefore, it can be concluded that jurisdiction seen from the human rights perspective is different from that seen from the public international law perspective. Human rights law focuses on authority over persons or over territory.

"Jurisdiction" in the human rights sense of the term will be used in Chapters Four and Five. In this chapter, however, the public international law or human rights sense in which the "jurisdiction" appears will always be indicated in order to avoid misunderstandings.

3.1.3 Responsibility

State responsibility becomes relevant for this thesis in two ways: (a) responsibility according to public international law and (b) responsibility under the ECHR.

State responsibility is a fundamental principle of public international law. Whenever one State commits an internationally wrongful act against another State, international responsibility is established between the two.[39] The conditions of State responsibility are, first, the existence of an international legal obligation in force between two particular States; and second, an act or omission which violates that obligation and which is imputable to the State responsible.[40]

State responsibility can also arise from the conduct of private persons. Article 8[41] of the International Law Commission (ILC)'s Draft Articles on State Responsibility[42] indicates two circumstances in which the conduct of private persons or entities is attributable to a State under international law. The first involves private persons acting on the instructions of the State by carrying out the wrongful conduct. The second involves more general situations where private persons act under a State's direction or control.[43]

This issue was also addressed in the Nicaragua case. In that case, the International Court of Justice (ICJ) took the view that, for the purpose of attributing acts committed by the *contras* to the United States, "it would in principle have to be proved that that state had effective control of the military or paramilitary operation in the course of which the alleged

[39] Malcolm N. Shaw, supra fn. 27, at p. 778.
[40] H. Mosler, The international Society as a Legal Community (Sijhoff and Noordhof, 1980), 1980, p. 157, and Malcolm N. Shaw, supra fn. 27, at p. 781.
[41] "The conduct of a person or group of persons shall be considered as an act of state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct."
[42] Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 1 November 2001.
[43] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), p. 110.

violations were committed."[44] Meanwhile, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that State responsibility (also) arises from the overall control[45] exercised by a State over a group.[46] The ICJ revisited the issue in the Genocide case[47] in which it reaffirmed the effective control test by distinguishing the Genocide case from the Tadic case.

State responsibility established in this way becomes important for this research because a State such as Spain is duty-bound not to return any refugee to a place where that person may be tortured, treated or punished inhumanly or degradingly or persecuted. It should be noted however that, if Spain committed international wrongful acts against Cape Verdeans, then only Cape Verde would be competent to engage Spain's responsibility.[48]

State responsibility is also relevant vis-à-vis violations of the ECHR. Here, the term "jurisdiction" will be used in the human rights law sense. State parties to the ECHR may be held responsible on the basis of decisions of the ECtHR. The Court may establish a State's responsibility if, among other things, that State is found to have had jurisdiction over those whose human rights were violated. Article 1 of ECHR should be taken into account here, because this Article deals with State jurisdiction and examines problems regarding State responsibility in cases where the State acts extraterritorially. The Court has taken the view that a State may be held responsible even in cases where it has extraterritorial jurisdiction within the meaning of Article 1 of the ECHR.[49] Accordingly, a State's responsibility may be established for its acts executed on territory other than its own as long as that State exercises control over such territory. This is also the case where a State has control over a person[50] outside of its own territory.

This latter kind of responsibility is important because it is not a State-to-State relationship but an individual-to-State relationship. Here, an individual may file a petition

---

[44] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), judgement of 27 June 1984 ICJ, para. 115.
[45] Prosecutor v. Tadic, Case IT-94-1, 15 July 1999, Appeals Chamber (hereinafter: Tadic Case), para. 131.
[46] Ibid., para. 123.
[47] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), judgement of 26 February 2007 ICJ, paras. 403-406.
[48] Whether Cape Verde would wish to do so is another matter altogether.
[49] Loizidou v. Turkey (Appl. No. 15318/89), judgement of 18 December 1996 ECtHR, para. 52; Cyprus v. Turkey (Appl. No. 25781/94), judgment of 10 May 2001 ECtHR, para. 76.
[50] Ilascu and Others v. Moldova and Russia (Appl. No. 48787/99), judgement (Grand Chamber) of 8 July 2004 ECtHR, para. 333; Pad and Others v. Turkey (Appl. No. 60167/00), decision (Third Section) of 28 June 2007 ECtHR, para. 53; also: Mohammed Ben El Mahi and Others v. Denmark (Appl. No. 5853/06), decision (Fifth Section) of 11 December 2006 ECtHR, the Court's findings about the law; and Isaak and Others v. Turkey (Appl. No. 44587/98), decision of 28 September 2006 ECtHR, the Court's findings about the law (the Court's assessment of the general principles). This issue will be examined further later in the thesis see: IV/A.

with the ECtHR when he or she is within the jurisdiction of one of the States parties to the ECHR and his or her rights are violated under this Convention.[51] Therefore, a Cape Verdean or other African may have a case before the ECtHR if they are under the jurisdiction of one of the States parties to the ECHR (i.e., under Spain's jurisdiction in this case).

3.2 Extraterritorial jurisdiction

Under this heading, the term "jurisdiction" will be understood in the public international law sense. It is more difficult to define the scope of jurisdiction with regard to the extraterritorial exercise of State powers (i.e., prescribe, apply or enforce its own law extraterritorially). As noted earlier, extraterritorial jurisdiction means that a State acts beyond its borders. Here, we have to consider the interests of more than one State. This conflicting interest was discussed in the Lotus decision where the Permanent Court of International Justice (PCIJ) stated that States are free to exercise prescriptive jurisdiction extraterritorially as long as it does not come into conflict with international law. In contrast, States may not exercise power in any form in the territory of another State except by virtue of a permissive rule derived from international custom or from a convention.[52] Therefore, a special entitlement is needed for exercising extraterritorial enforcement jurisdiction. Such an entitlement can be obtained through treaties, customary law or the consent of the State in whose territory that jurisdiction is exercised.[53]

Since interception activities belong to enforcement measures, this thesis will henceforth focus on extraterritorial enforcement jurisdiction.

In order to see whether Spain has extraterritorial enforcement jurisdiction, we need to examine the agreement between Spain and Cape Verde. As seen above, a special agreement is needed for exercising such jurisdiction. Can the agreement between Spain and Cape Verde be considered as a "convention" in the sense of the Lotus case? According to Article 2(1)(a) of the VCLT,[54] a treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more

[51] Art. 35 of the ECHR amended with Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004 deals with admissibility.
[52] SS Lotus (France v. Turkey), PCIJ Reports, Series A, No 10, pp. 18-19 (1927).
[53] Bernard Ryan, supra fn. 3, at p. 74.
[54] VCLT adopted on 25 May 1969; entered into force on 27 January 1980.

related instruments and whatever its particular designation. The bilateral agreement between Spain and Cape Verde can be considered a convention in accordance with the Lotus case.

In summary, according to the Lotus case, direct consent (e.g., through a bilateral agreement) by one State means that another State can exercise power on the former's territory, and this establishes the latter's extraterritorial enforcement jurisdiction. For example, in the Eichmann incident,[55] the Israeli authorities did not have this entitlement from Argentina; had they had it, they would have acted lawfully. Therefore, free consent by one State to allow another State to exercise power within its territory constitutes lawful extraterritorial enforcement jurisdiction of the latter.

At first sight, it may appear as though Cape Verde had authorised Spain to exercise extraterritorial enforcement jurisdiction through the bilateral agreement. However, a closer examination of the agreement reveals that Spain acts under the jurisdiction of Cape Verde.[56] Spain helps enforce Cape Verde's law[57] within the latter's territorial waters, rather than enforcing its own (Spanish) law which would amount to extraterritorial jurisdiction. There are always Cape Verdean personnel on board Spanish vessels[58] because the control, visits, arrests and interventions should be carried out only by the Cape Verdean authorities or under their command. They enforce only Cape Verdean legislation during border controls.[59] Therefore, Spain does not carry out immigration control in the territorial waters of Cape Verde on the basis of extraterritorial enforcement jurisdiction.

[55] UN Document S/4336 Letter dated 15 June 1960 from the Representative of Argentina Addressed to the President of the Security Council where Argentina requested reparation because Israel violated its sovereignty when "Adolf Eichmann had been captured in Argentine territory" by Israel (which is an exercise of extraterritorial enforcement jurisdiction by Israel); see also Security Council Resolution 138 (1960): Question relating to the case of Adolf Eichmann (23 June); where the Security Council stated that "the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic" (which means that when Israel exercised enforcement jurisdiction without Argentina's consent it violated Argentina's sovereignty).

[56] Art. 1, Spanish-Cape Verdean bilateral agreement: "This Agreement sets out the conditions for joint monitoring and patrolling of maritime areas under the sovereignty and jurisdiction of the Party Cape Verde, in the framework of respect for international law," and Art. 4: "The Spanish Party will participate in maritime surveillance aircraft and patrol boats in all the areas under the sovereignty and jurisdiction of the Cape Verdean Party."

[57] Art. 3(3), Spanish-Cape Verdean bilateral agreement: "The Spanish Party will address with their means to the extent of its capabilities and the scope of this Agreement, to the requests for support by the Cape Verdean Party to proceed with the interception of vessels suspected of illegal trafficking activities of persons, drugs and weapons."

[58] Art. 3, Spanish-Cape Verdean bilateral agreement.

[59] Art. 6(5), Spanish-Cape Verdean bilateral agreement: "control interventions, visit or capture, especially the latter, can only be made by the Cape Verdean authorities or under their direction."

3.3 What sort of jurisdiction is created under the bilateral agreement in the context of FRONTEX operations?

In relation to Spain and Cape Verde, we examined the problem of jurisdiction (in the public international law sense) within Cape Verde's territorial waters. The situation is different with FRONTEX, however. The scene is the following: based on bilateral agreements between EU Member States and third States, the European Union cooperates with its Member States in "exercising" border control also outside of their territory, namely on the high seas and in the third States' territorial waters. In this joint operation, the EU Border Agency, FRONTEX, has a co-ordination role. Thanks to the amended Council Regulation 2007/2004, FRONTEX operations may include active border guard activities.[60] Consequently, the interdiction operations are carried out not only at the European Union external borders[61] but also in the territorial waters of third States. This was the case (among others) in the HERAII operation in 2006 in which Spanish and FRONTEX ships took part in the joint operation and used helicopters, navy ships on the high seas as well as in the territorial waters of Spain, Senegal, Mauritania and Cape Verde.

In this scenario, the question is what kind of jurisdiction can be established for FRONTEX and Spanish patrols when they carry out interception activities:

1. In Spanish territorial waters;
2. On the high seas; and
3. In the territorial waters of Cape Verde.

The jurisdiction exercised during interception activities is executive in nature since State agents execute orders of the State. The basis of this kind of jurisdiction varies according to the three aforementioned scenarios.

1.)

In the first case, according to the UNCLOS, a State's sovereignty extends within its land territory, internal waters and territorial sea.[62] The State has territory-based enforcement jurisdiction over these areas. From this perspective, the jurisdiction of EU Member States

[60] Arts. 10 and 12, EC Regulation 863/2007.
[61] Art. 1(a), Council Regulation 2007/2004: "the land and sea borders of the Member States and their airports and seaports, to which the provisions of Community law on the crossing of external borders by persons apply."
[62] Art. 2(1), UNCLOS.

within their own territory is clear. FRONTEX's main task is to co-ordinate joint operations by EU Member States at their external sea, land and air borders. Article 2 of Council Regulation 2007/2004 states that the responsibility for the control and surveillance of external borders lies with the Member States and that FRONTEX facilitates their efforts. The Regulation also renders more effective the application of existing and future EU measures relating to the management of external borders. By doing so, the Regulation ensures coordination among the EU Member States in implementing Community rules and contributes to an efficient and uniform level of control on persons and surveillance of the external borders. FRONTEX is an agency of a supranational organisation. Although international organisations have rights and duties, they do not have sovereignty. States can decide what kind of rights they give to such organisations and their organs. FRONTEX has not received jurisdictional power. Therefore, even when FRONTEX officers participate in border guard activities on the territory of a Member State,[63] the jurisdiction is exercised by that Member State in which the operation takes place. In our case, it is Spain that has the jurisdiction.

Although the contiguous zone is subject to the principle of the freedom of the high seas, the coastal State is entitled to exercise control over the zone for border control purposes.[64] The foregoing observations applicable to the territorial waters also apply to the contiguous zone.

2.)

Operating on the high seas is different from the above since the law of the sea also applies. One of the basic principles of the law of the sea is the freedom of the high seas; that is, the high seas are open to all States.[65] Another important feature of the high seas is that no State has jurisdiction over any part of them.[66] Flag States have exclusive jurisdiction over their ships on the high seas.[67] The right to board and intercept on the high seas is therefore limited. According to Article 110(1) of the UNCLOS, no ship is entitled to board another ship unless there is a reasonable ground therefor. One such ground is where the ship is without nationality. This means that if the vessel does not have any flag, there is no provision under the law of the sea which would prohibit a State from exercising enforcement jurisdiction and

[63] According to EC Regulation 863/2007, they are bound by Community law and instruction of the Member State in which the action takes place, while also remaining under the disciplinary law of their home Member State.
[64] Art. 33(1), UNCLOS.
[65] Art. 87(1), UNCLOS.
[66] Art. 89, UNCLOS.
[67] Art. 92, UNCLOS.

boarding it.[68] Another possibility occurs if there is a bilateral agreement; States are then allowed to board under this agreement even on the high seas. Therefore, it is permissible to intercept vessels sailing under foreign flags under the law of the sea as long as the flag State's consent is obtained.[69] Since FRONTEX operations such as HERA I and HERA II were based upon bilateral agreements[70] (e.g., that between Spain and Cape Verde), Spanish and FRONTEX ships were allowed to perform interception. Another possible exception is the obligation of rescue at sea. Since the boats used by irregular immigrants are often not safe to travel on the high seas, all ships have the obligation to rescue them. In addition, these "ships" do not even have any flag since they are so small.

On the high seas, the flag State's jurisdiction does not cease to exist when another State boards its vessel to visit.[71] These types of visits do not amount to the exercise of jurisdiction in any sense.

3.)

The Spanish-Cape Verdean bilateral agreement contains a provision authorising not only Spanish vessels but also FRONTEX vessels to participate in emigration control.[72] As already discussed, Spain does not have jurisdiction during these operations on the basis of the bilateral agreement. Nor does FRONTEX have jurisdiction, since it is an agency of the European Union which does not have jurisdiction.

[68] Bernard Ryan, supra fn. 3, at p. 95.
[69] Medvedyev and Others v. France (Appl. No. 3394/03), judgment (Grand Chamber) of 29 March 2010 ECtHR, paras. 31, 32, 33.
[70] FRONTEX release: http://www.frontex.europa.eu/newsroom/news_releases/art8.html and Joint Declaration on a Mobility Partnership between European Union and the Republic of Cape Verde, 9460/08 Brussels, 21 May 2008, in Annex.
[71] Arts. 92 and 110, UNCLOS.
[72] Bernard Ryan, supra fn. 3, at pp. 330-331.

CHAPTER FOUR

Human Rights Protection under Extraterritorial Jurisdiction

4.1 The extraterritorial application of human rights

We have seen that Spain does not exercise extraterritorial enforcement jurisdiction from the public international law point of view. The outcome is quite different when we examine the question from the human rights point of view. Here, since Spain is party to the ECHR, the extraterritorial application of the ECHR comes into the picture. The "jurisdiction" of a State within the meaning of Article 1 of the ECHR means first, jurisdiction over those who are within the territory of the State and, second, control that the State exercises over a territory or over a person. In the latter case, this State does have extraterritorial jurisdiction. It is in this sense that this thesis will henceforth use the term "jurisdiction."

At issue here is whether Spain has extraterritorial jurisdiction when it intercepts migrants in the territorial waters of Cape Verde or on the high seas. In order to establish Spain's jurisdiction, the case law of the ECtHR has to be examined. The Court has identified the possibility of establishing jurisdiction when the contracting States exercise authority over territory and/or persons. The most important questions are how to establish control over an individual and, in particular, whether it is necessary that a State exercise effective control over a territory in order to establish its extraterritorial jurisdiction over a person otherwise already under its control. In our case: (1) does Spain have authority over intercepted persons in the territorial waters of Cape Verde and on the high seas; and (2) does Spain need to control the territorial waters of Cape Verde and the high seas in order to establish its extraterritorial jurisdiction over intercepted persons?

According to the case law of the ECtHR and the European Commission of Human Rights (EComHR), a State has authority over a person through the effects of its State agents[73] (factual relationship or factual authority[74]) or with physical custody.[75] The former is relevant

[73] Cyprus v. Turkey (Appl. No. 6780/74; 6950/75), decision of 26 May 1978 EComHR, p. 137; and W. M. v. Denmark (Appl. No. 17392/90), decision of 14 October 1992 EComHR, the Commission's findings about the law, para. 1.
[74] Hugh King, The Extraterritorial Human Rights Obligations of States, Human Rights Law Review, 9 2009 (pp. 521-556), p. 530.

to Spain because there is a factual connection between the Spanish officials and those they intercept in the territorial waters of Cape Verde. These officials have control over intercepted persons, and the fact that there are also Cape Verdean officials on board does not change this control. The same can be said of the high seas.

In the Bankovic[76] case, the ECtHR took a strict approach to the extraterritorial application of the ECHR. In subsequent cases, however, the Court did not require this strict approach.

The Bankovic case was, and still is, subject to criticism and considered controversial. Authors recognise that the case creates severe restrictions on the extraterritorial scope of jurisdiction.[77] According to Efthymos Papastavridis, the limitation on the extraterritorial application of the ECHR has not been consistently upheld in a series of post-Bankovic decisions. Instead, the Court has extended the concept of jurisdiction to other types of conduct (i.e., in addition to the exercise of all or some of the public powers of the government involving the activities on board craft and vessels already acknowledged in the Bankovic decision) occurring outside the territorial boundaries of the contracting States.[78] Papastavridis argues that there is no need to militate against the Bankovic judgement since the case of State vessels intercepting on the high seas fits squarely within the Bankovic judgement's exception regarding activities on board vessels registered in the flag State.[79]

Meanwhile, there are strong opponents of the Bankovic decision. Thomas Gammeltoft-Hansen concludes that it becomes harder to establish jurisdiction when a State intercepts vessels inside foreign territorial waters.[80] He doubts that turning back a ship entails effective control in the personal sense.[81] In Michal Gondek's view, however, although the territorial aspect was stressed in the Bankovic case, the personal approach to jurisdiction should not be dismissed not least due to the wording of Article 1 of the ECHR.[82] This Article

---

[75] Öcalan v. Turkey (Appl. No. 46221/99), judgement (Grand Chamber) of 12 May 2005 ECtHR, para. 91.
[76] Bankovic and Others v. Belgium and 16 other contracting states (Appl. No. 52207/99), decision (Grand Chamber) 19 December 2001 ECtHR.
[77] Andreas Fisher-Lescano, Tillmann Löhr and Timo Tohidipur, Border Controls at Sea: Requirements under International Human Rights and Refugee Law, International Journal of Refugee Law 21 2009 (pp. 256-296), p. 274.
[78] Efthymos Papastavridis, Interception of Human Beings on the High Seas: a Contemporary Analysis under International Law, Syracuse Journal of International Law and Commerce, 36 2009 (pp. 145-228), pp. 222-223.
[79] Ibid., p. 223.
[80] Thomas Gammeltoft-Hansen, supra fn. 19, at p. 22.
[81] Ibid.
[82] Michal Gondek, The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties (Intersentia, 2009), p. 179.

speaks of a person within the jurisdiction of a State party, not of the territory under its jurisdiction, an interpretation that was reaffirmed in later cases.[83]

Therefore, we need to examine whether the Bankovic case is applicable to the Spanish-Cape Verdean situation. In the Bankovic case, the Court required effective control over both the Federal Republic of Yugoslavia's territory and its inhabitants[84] whereas, according to the facts, NATO pilots effectively controlled neither. The Bankovic case is distinguishable from the Spanish-Cape Verdean situation at hand for two reasons.

First, NATO pilots did not exercise effective control over the people they bombed, whereas Spanish officials do exercise effective control over the people they intercept. The Spanish officials have the irregular immigrants present and exercise factual power over them. These officials have the power not to allow immigrants to leave Cape Verde. It should also be noted that this control is shared by the Cape Verdean official on board since the latter would not be able to intercept an entire boat on his own. Therefore, Spain also plays a role and is involved in the act of interception.

Second, the ECtHR's case law actually requires only effective control over a person *or* effective control over territory. In order for State A to exercises its jurisdiction over a person extraterritorially, it is sufficient that State A's official exercises effective control over that person. This is so notwithstanding the Bankovic case in which the Court stated:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

According to the decision of Issa and Others v. Turkey, extraterritorial jurisdiction can be established in two ways. One is through effective control over a defined territory and the other is through authority or control exercised by a State over an individual[85]:

[83] Ibid.
[84] Bankovic, supra fn. 76, at para. 71.
[85] Issa and Others v. Turkey, supra fn. 37, at para. 71.

> [A] State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State.

In the Öcalan case, the Court distinguished the situation of Öcalan from that of Bankovic and stated:

> The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned Banković and Others case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.[86]

Thus, Turkey's effective authority over the applicant brought him within Turkish jurisdiction under Article 1 of the ECHR although Turkey exercised its authority initially outside its territory.

In the Ilascu and Others v. Moldova and Russia case, the Court interpreted jurisdiction broadly and found that Moldova did not cease to have jurisdiction within the meaning of Article 1 over that part of its territory which was temporarily subject to a local authority.[87]

In the Pad case, the Court repeated the possibility of establishing jurisdiction on the basis of control over persons:

> A State may be held accountable for violations for the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States, but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter state. [88]

[86] Öcalan v. Turkey (Appl. No. 46221/99) judgment (First Section) of 12 March 2003 ECtHR, para. 93.
[87] Ilascu and Others v. Moldova and Russia, supra fn. 50, at para. 333.
[88] Pad and Others v. Turkey, supra fn. 50, at para. 53; also: Mohammed Ben El Mahi and Others v. Denmark, supra fn. 50, the Court's findings about the law; and Isaak and Others v. Turkey, supra fn. 50, the Court's findings about the Law (the Court's assessment of the general principles).

In sum, these ECtHR cases show that control over a person is sufficient to establish extraterritorial jurisdiction. When Spain intercepts boats on the territorial waters of Cape Verde, it has the power to control these boats and the persons on them and therefore has jurisdiction over these intercepted persons.

The same can be said of interceptions taking place on the high seas. It should nevertheless be noted that territorial control would be irrelevant in any event. According to the UNCLOS, no State has sovereignty over the high seas where boarding vessels is permissible only in certain circumstances.

As noted earlier, the flag State has exclusive jurisdiction over a ship.[89] Exceptions to this rule arise only where there a is reasonable ground for suspecting that the ship is engaged in piracy, slave trade or unauthorised broadcasting; where the ship is without nationality; or where the ship has the nationality of the intervening State.[90] Sometimes, boats from Cape Verde do not have any flag; nor are they even capable of transporting people through the ocean. Therefore, the Spanish authorities have the right to visit these boats in the first case and the duty to rescue them in the second case. According to the Palermo Protocol, intercepting vessels on the high seas suspected of transporting would-be irregular migrants is permitted. If a ship which transports would-be irregular migrants has the flag of the intercepting State, then the latter has jurisdiction over the former but may request assistance from other States as well.[91] If the ship is flying the flag of another State party, the interdicting State shall request authorisation from the flag State to take appropriate measures with regard to that vessel.[92] Although the possibility of intercepting vessels in these cases does not mean that the flag State's jurisdiction ceases to exist,[93] the intercepting State does have authority or personal control over the people on board the intercepted vessels.

In sum, in human rights, personal control is sufficient to establish extraterritorial jurisdiction. Therefore, the ECHR is applicable not only in the territorial waters of Spain but also on the high seas and in the territorial waters of Cape Verde. Although the ECtHR has ruled that extraterritorial jurisdiction should be established according to the particular circumstances of each case, it can be concluded that Spain has jurisdiction over the intercepted in the territorial waters of Cape Verde within the meaning of the ECHR.

[89] Arts. 87(1)(a) and 92(1), UNCLOS.
[90] Art. 110, UNCLOS.
[91] Art. 8(1), Palermo Protocol.
[92] Art. 8(2), Palermo Protocol.
[93] See chapter 3.3 point 2.

One further problem regarding extraterritorial jurisdiction over persons arose in the Behrami and Saramati case.[94] This case involved questions as to whether the alleged human rights violations committed by members of a UN peacekeeping force should be attributable to the States of their nationality (in which case these States would have jurisdiction over the victims within the meaning of Article 1 of the ECHR) or to the United Nations (in which case they not have jurisdiction within the meaning just described).[95] According to the facts of the Behrami and Saramati case, the United Nations Security Council had command and control over the troop contributing nations' personnel. In the event, the ECtHR held that the acts of peacekeepers were not attributable to the States of their nationality but to the United Nations. Now, as noted earlier, Spanish interceptions in Cape Verde's territorial waters are carried out under the latter's authority and jurisdiction; Spain does not have jurisdiction in the public international law sense and Spanish officers act under the command of the Cape Verdean authorities.[96] Thus, if the Behrami and Saramati case applies to the Spanish-Cape Verdean situation at hand, then it is arguable that the acts of Spanish officials are not attributable to Spain but to Cape Verde.

In order to distinguish the Behrami and Saramati case from our situation, two points have to be examined. First, according to the ECtHR, the troop contributing nations had no operational control.[97] Second, the ECtHR did not consider the question whether the applicants come within the jurisdiction of the respondent States within the meaning of Article 1 of the ECHR.[98]

As for the first point, the ECtHR reasoned that the impugned action was attributable to the UN because (among others) the contributing countries did not have any control of the mission and the UN has a legal personality separate from its Member States.[99] The applicants' submission was therefore incompatible ratione personae with the provisions of the ECHR.[100] In the Spanish case, however, Span's naval and air assets remain under its own organic and

[94] Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France Germany and Norway (Appl. No. 71412/01, 78166/01), judgement (Grand Chamber) of 2 May 2007 ECtHR.
[95] Ibid., para. 121.
[96] See p. 17.
[97] Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France Germany and Norway, supra fn. 94, at para. 139.
[98] Aurel Sari, Jurisdiction and International Responsiblity in Peace Support Operations: The Behrami and Saramati Cases, Human Rights Law Review, 8 2008 (pp. 150-170), p. 158.
[99] Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France Germany and Norway, supra fn. 94, at para. 144.
[100] Ibid., para. 152.

tactical control;[101] also, in situations where international law governs the, Spanish authorities are not under the direction of Cape Verde.[102] Therefore, Spain has control over its officials that the troop contributing nations lacked over their UN peacekeepers in the Behrami and Saramati case.

Regarding the second point, whether or not a jurisdictional link within the meaning of Article 1 of the ECHR existed between the applicants and the respondent States is a preliminary matter which must be addressed before the enquiry into the attributability of the alleged wrongful conduct.[103] Instead of addressing this question, however, the ECtHR decided to investigate attributability.[104] The approach chosen by the ECtHR is unsatisfactory because it circumvents the central issue of jurisdiction.[105] The attributability of the relevant acts and omissions to the UN merely demonstrates that the UN could in principle incur responsibility for the internationally wrongful conduct of KFOR (Kosovo Force) and UNMIK (United Nations Interim Administration Mission in Kosovo) personnel. However, this fact does not exclude the possibility that the same conduct may *also* be attributable to the respondent States and may engage their international responsibility. Nor does it answer the question whether the applicants came within the respondent States' jurisdiction within the meaning of Article 1 of the ECHR.[106] If the applicants come under the jurisdiction of the Contracting States of the ECHR either because of the personal control that the States exercise or because of the States' control over the territory on which the applicants find themselves, then their submission is admissible.

For these reasons, the Bahrami and Saramati case is distinguishable from the Spanish-Cape Verdean situation at hand. This case does not control the subject of this thesis and, accordingly, the acts of Spanish officials are not attributable only to Cape Verde.

4.2 Rights of the intercepted

[101] Art. 6(4), Spanish-Cape Verdean bilateral agreement: "naval air assets of the Spanish Party shall be under organic and tactical control of their own."
[102] Art. 6(5), Spanish-Cape Verdean bilateral agreement: "With the exception of situations covered by international law, the control interventions, visit or capture, especially the latter, can only be made by the Cape Verdean authorities or under their direction."
[103] Aurel Sari, supra fn. 98, at p. 158.
[104] Ibid.
[105] Ibid., p. 159.
[106] Ibid.

What kind of rights do the intercepted have first in the territorial waters of Cape Verde, then on the high seas and finally in the territorial waters of Spain? These rights have both similarities and differences as the irregular migrants proceed with their journeys. Therefore their rights will be examined in every stage of their journey. What follows will give an overview of their basic human rights at each stage of their escape from the shore of Cape Verde. It should be noted that those on board the boats may come not only from Cape Verde but also from other countries. The migrants' nationality may affect the rights they have, such as their right to seek asylum. Another factor affecting the rights of the migrants is the identity of the interceptor: the Cape Verdean authorities, the Spanish authorities or both?

Right to life

This is an absolute right,[107] no matter where the immigrants are and no matter who has authority or jurisdiction over them. Spain is duty-bound to protect the immigrants' lives according to the ECHR and the ICCPR in the territorial waters of Cape Verde, on the high seas and in its own territorial waters. Cape Verdean officials also have the duty under the ICCPR to protect the life of those who try to leave Cape Verde.

However, the right to life is also subject to special circumstances when the use of force is absolutely necessary, e.g., in situations of self-defence, effecting lawful arrest, preventing the escape of the lawful detainees or quelling riots lawfully.[108] In countries where the death penalty is not abolished yet, the sentence of death may be imposed and carried out for the most serious crimes.[109]

Prohibition of torture

The prohibition of torture is relevant in two ways. The first is the migrants' right not to be tortured, and the second is their protection against being sent back to places where they face torture. The latter aspect will be discussed within the framework of non-refoulement (see below), while the former aspect will be discussed here.

Some authorities treat the prohibition of torture as enjoying the status of jus cogens.[110] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of

[107] See Art. 2, ECHR, Art. 6, ICCPR. ICCPR entered into force on 23 March 1976; acceded by Cape Verde on 6 August 1993; signed by Spain on 28 September 1976 and ratified on 27 April 1977.
[108] Art. 2(2), ECHR.
[109] Art. 6(2), ICCPR.
[110] Antonio Cassese, supra fn. 28, at p. 203; Prosecutor v. Furundzija IT-95-17/1-T, 21 July 2000 Trial Chamber ICTY, paras. 144, 153-157; Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex Parte Pinochet, UKHL (24 March 1999) p. 589 (Lord Browne-Wilkinson), P. 626 (Lord Hope of Craighead), pp. 649-650 (Lord Millett). International Legal Materials, Vol. 38 No. 3 (May 1999).

Punishment (CAT)[111] defines torture[112] and adds that States parties shall ensure that all acts of torture are offences under their domestic criminal law.[113] The ICCPR specifies the prohibition of torture thus: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[114] The CAT and the ICCPR encompass not only torture but also cruel, inhuman or degrading treatment or punishment, whether inflicted physically or mentally.[115] Article 3 of the ECHR also prohibits torture and inhuman or degrading treatment. It should be noted that human rights law requires the involvement of State authorities in order for that act to constitute torture.

Based on the foregoing, the prohibition of torture is absolute in nature. Therefore, this prohibition is applicable in every stage of the migrants' voyage and it shall be respected by the Spanish and Cape Verdean authorities.

Right to liberty and security

Article 5 of the ECHR protects the right to liberty and security of persons. This right is not absolute, however. Article 5(1) enumerates examples in which the deprivation of this right is possible. Article 5(1)(f) is important because it permits Spain to arrest or detain irregular immigrants to prevent an unauthorised entry into its territorial. The situation is complex in the territorial waters of Cape Verde. Although the Spanish authorities are duty-bound to apply the ECHR as long as they have authority over the intercepted according to Article 1 of ECHR, Article 5(1)(f) allows Spain to prevent their entry into its territory. Since the territorial waters of Spain and those of Cape Verde do not share boundaries, while in the latter waters the Spanish and Cape Verdean authorities can only prevent entry to the high seas. Also, the possibility cannot be eliminated that the destination of the immigrants is not Spain. Thus, one of the elements of the Article 5(1)(f) is not fulfilled and, as a result, Spain cannot rely on it. A parallel can be drawn with the Roma case,[116] in which the House of Lords did not accept the notion that there was a "virtual frontier" at Prague Airport between the United Kingdom and the Czech Republic. Similarly, it is hard to say that there exists a border between Spain and

[111] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; entered into force on 26 June 1987; acceded by Cape Verde on 4 June 1992; signed by Spain on 4 February 1985 and ratified on 21 October 1987.
[112] Art. 1, CAT.
[113] Art. 4(1), CAT.
[114] Art. 7, ICCPR.
[115] Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (third edition Oxford University Press, 2007), p. 306.
[116] Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), 2004 UKHL 55 (9 December 2004) para. 26 (Lord Bingham), and para. 43 (Lord Steyn) (Hereinafter: Roma Rights Case).

Cape Verde at a point where the territorial waters of Cape Verde end. The situation is different on the high seas where Spain intercepts vessels on the basis of the Palermo Protocol and where, according to the UNCLOS, it has the right to visit them. Finally, the right to liberty and security is also applicable in Spain's own territorial waters.

Protection against cruel inhuman and degrading treatment or punishment

Inhuman treatment "encompasses at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."[117] Degrading treatment is that which humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[118] Protection against such treatment is also an absolute right which can be found in Article 16 of the CAT, Article 7 of the ICCPR and Article 3 of the ECHR. It can be concluded that Spain and Cape Verde are duty-bound to apply these rules both in their territorial waters and on the high seas.

The right to family life

Article 8(1) of the ECHR protects the right to respect for private and family life, home, and correspondence.

In the Abdulazis v. UK case, the ECtHR dealt with the right to family life from an immigration point of view. In that case, the Court rejected the British government's view that Article 8 of the ECHR would not apply at all to immigration control.[119] According to the Court, whereas the right of a foreigner to enter or remain in the country is not guaranteed as such by the ECHR, immigration controls ought to be exercised in accordance with ECHR obligations and the exclusion of a person from a State in which members of his family were living might raise an issue under Article 8.[120] The Court unanimously held that Article 8 was applicable in the Abdulaziz case but that, taken alone, it had not been violated. It also held that Article 14, taken together with Article 8, had been violated by reason of discrimination

[117] Greek case (1969) 12 Yearbook of the European Commission of Human Rights 1, p. 186; Denmark v. Greece Appl. No. 3321/67; Norway v. Greece Appl. No. 3322/67; Sweden v. Greece Appl. No. 3323/67; The Netherlands v. Greece Appl. No. 3344/67.
[118] Pretty v. UK (Appl. No. 2346/02), judgement (Fourth Section) of 29 April 2002 ECtHR, para. 52.
[119] Abdulaziz, Cabales and Balkandali v. United Kingdom (Appl. No. 9214/80, 9473/81; 9474/81), judgement (Plenary) of 28 May 1995 ECtHR, para. 59.
[120] Ibid.

against each of the applicants on the ground of their sex.[121] Since interception is part of Spain's immigration control, one can imagine a situation in which interception affects the right to family (e.g., when family members are separated or one family member is already in the territory of one of the EU Member States). Therefore, the Spanish authorities should respect this right when they intercept vessels in the territorial waters of Cape Verde, on the high seas and in the Spanish territorial waters.

Right to leave

The right to leave any country is protected in Article 2(2) of the Fourth Protocol to the ECHR[122] and in Article 12(2) of the ICCPR.[123] This right is closely connected to the liberal notion of the freedom of movement and the right to seek protection from political persecution. This is not an absolute right. There are limitations under the Fourth Protocol to the ECHR[124] and the ICCPR,[125] although these restrictions shall be narrowly construed.[126]

The ECtHR has stated that the right to leave any country under Article 2 of the Fourth Protocol to the ECHR implies a right to leave for a country of the person's choice to which he may be admitted.[127] The right to leave implies a dual obligation on the State: a negative obligation not to prevent departure and a positive obligation to issue travel documents.[128] The denial or seizure of a passport or other necessary travel documents constitutes a direct interference with the right to leave and, in order to be legitimate, such interference needs to satisfy the requirements for the permissible restrictions.[129]

However, there is no duty on States to admit persons into their territories. It follows that the right to leave is not a right which other States need to complete through a duty to admit. This is an incomplete right, since there is no corresponding duty of other States to guarantee entry to persons other than their own nationals or those with "special ties to or

[121] Ibid. the Court's findings.
[122] "Everyone shall be free to leave any country, including his own."
[123] "Everyone shall be free to leave any country, including his own."
[124] Art. 2, Fourth Protocol to the ECHR.
[125] Art. 12(3), ICCPR.
[126] Strasbourg Declaration on the Right to Leave and Return, Meeting of Experts, International Institute of Human Rights, 26 November 1986, The American Journal of International Law Vol. 81 No. 2. April 1987 (432-438), pp. 434-435.
[127] Napijalo v. Croatia (Appl. No. 66485/01), judgement (First Section) of 13 November 2003 ECtHR, para. 68.
[128] Human Rights Committee, General Comment No. 27, para. 9; Thomas Alexander Aleinikoff and Vincent Chétail eds., Migration and International Legal Norms (T.M.C. Asser Press, 2003), p. 55.
[129] Baumann v. France (Appl. No. 33592/96) judgment (Third Section) of 22 May 2001, ECtHR paras. 63-67; and Napijalo v. Croatia, supra fn. 127, at para. 73.

claims in relation to a given country."[130] Nevertheless, States are bound by the principle of non-rejection at their respective frontiers where non-refoulement applies from the moment when asylum seekers present themselves for entry.[131]

Yet, in the Xhavara v. Albania and France case, the ECtHR rejected the applicability of the right to leave, stating that the measures taken by the Italian authorities were not aimed at preventing people from leaving Albania but preventing them from entering Italy.[132] For the right to seek asylum to have any meaning, however, it needs to imply not only a right to access asylum procedure but also to leave one's country in search of protection.[133]

In view of the foregoing, we may now examine the three different venues and the duties of the Spanish and Cape Verdean authorities. In the territorial waters of Cape Verde, the Cape Verdean authorities have the duty to let Cape Verdean immigrants leave the country and issue travel documents for them. According to the ICCPR and the Fourth Protocol to the ECHR, non-Cape Verdean citizens also have the right to leave Cape Verde. As for Spain, nothing in the law appears to place Spain in a position different from that of Cape Verde in respect of Spain's duty not to prevent Cape Verdean or other nationals from leaving Cape Verde. On the high seas, the application of this right is not as clear, since in the Xhavara case the ECtHR did not evaluate Italy's interception action on the high seas as a violation of the right to leave. Rather, on the high seas, the duty to rescue comes into play (this duty will be discussed later in the thesis). In the territorial waters of Spain, the picture is different since, as already mentioned, there is no obligation on Spain to let irregular immigrants into its own territory. It should be mentioned that asylum seekers cannot be turned back at the frontier of Spain.

(Extraterritorial) access to justice

Article 13 of the ECHR provides that everyone whose rights and freedoms protected in the ECHR are violated shall have an effective remedy before a national authority notwithstanding the fact that the violation has been committed by persons acting in an official capacity. A "mere" claim that there has been a breach of one of the rights of the ECHR is sufficient to trigger Article 13, since Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority to everyone who claims that his rights and

[130] Human Rights Committee, General Comment No. 27, para. 20; and Guy S. Goodwin-Gill, supra fn. 115, at p. 382.
[131] Guy S. Goodwin-Gill, supra fn. 115, at pp. 207, 208, 383.
[132] Xhavara and fifteen v. Italy and Albania (Appl. No. 3947/98), decision (Fourth Section) of 11 January 2001 ECtHR, para. 3. under the heading "The Law".
[133] Guy S. Goodwin-Gill, supra fn. 115, at p. 384.

freedoms under the Convention have been violated."[134] If, for example, Spanish officals violate the provisions of the ECHR while they intercept (wherever the interception occurs) the immigrants, the latter shall have an effective remedy. Therefore, it can be concluded that the Spanish authorities have the duty to respect Article 13 whenever they intercept a migrant irrespective of where the interception happens.

Non-refoulement (to drive back, to repel)

We need to make a distinction between non-refoulement based on the Refugee Convention[135] and non-refoulement outside of this conventional framework. In the case of the former, no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment or torture.[136] The problematic issue here is that this set of rules applies only to refugees. In other words, they have to meet the requirements of the Refugee Convention first. This makes the application of the Refugee Convention more difficult than the right of non-refoulement outside of this framework. Before examining other conventions dealing with non-refoulement, one should bear in mind the fact that States can be bound by different conventions and can therefore have different legal obligations. Both Spain and Cape Verde are parties to the ICCPR and the CAT, while only Spain is also a party to the ECHR and only Cape Verde is also a party to the Convention on the Specific Aspects of Refugee Problems in Africa.[137]

Non-refoulement itself gives protection to those who may not be refugees but still facing torture, cruel, inhuman or degrading treatment or punishment. This obligation is found in the ICCPR,[138] CAT[139] and the ECHR.[140] The protection of rights other than the prohibition of torture, cruel, inhuman or degrading treatment or punishment may also trigger the obligation of non-refoulement. The Human Rights Committee tends to accept that returning an individual to face a real risk of violation of any ICCPR right may constitute refoulement.[141]

---

[134] Silver and Others v. United Kindgom (Appl. No: 5947/72, 6205/73, 7052/75, 7061675, 7107/75, 7113/75, 7135/75), report (plenary) of 11 October 1980 EComHR, paras. 438-439, 443.
[135] 1951 Convention relating to the Status of Refugees (hereinafter Refugee Convention); entered into force on 22 April 1954; and 1967 Protocol relating to the Status of Refugees; entered into force on 4 October 1967; Spain acceded to the Convention and to its Protocol on 14 August 1978; the Protocol acceded by Cape Verde on 9 July 1987.
[136] Art. 33, Refugee Convention; also Guy S. Goodwin, supra fn. 115, at p. 201.
[137] 1969 Convention on the Specific Aspects of Refugee Problems in Africa; entered into force on 20 June 1974; ratified by Cape Verde on 16 February 1989.
[138] Art. 7, ICCPR.
[139] Art. 3, CAT.
[140] Art. 3, ECHR.
[141] Human Rights Committee, General Comment No. 15, para. 5; also Human Rights Committee, General Comment No. 18.

In the Ullah case, the House of Lords found that, in relation to Article 3 of the ECtHR, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. When other Articles may become engaged, however, a high threshold test will always have to be satisfied. (Thus, for example, under Article 2, it is suggested that the loss of life must be shown to be a "near-certainty"; where reliance is placed on Article 6, it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving State). All the same, in principle, Articles 2, 4, 5, 7 and 8 could be engaged and trigger the duty of non-refoulement.[142] The House of Lords based its decision on those ECtHR cases in which the Court also stated that the removal of a person from a State party to the ECHR may raise protection issues not only under Article 3[143] but also under Article 2[144] and, exceptionally, under Articles 6[145] or 8.[146]

The Convention on the Specific Aspects of Refugee Problems in Africa declares in its Article II(3) that "no person shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in the territory where his life, physical integrity or liberty would be threatened."

The UNHCR Executive Committee stated that refugees and asylum seekers who move in an irregular manner from a country where they have already found protection may be returned to that country if they are protected against refoulement there and if they are treated in accordance with recognised basic human rights standards.[147] But there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom is endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State where he requests asylum.[148]

---

[142] Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant) Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) 2004 UKHL 26 (17 June 2004) paras. 24-25 (Lord Bingham), paras. 49-50 (Lord Steyn), para. 67 (Lord Carswell).
[143] Soering v. UK (Appl. No. 14038/88), judgement (Plenary) of 7 July 1989 ECtHR, para. 91; Cruz Varas v. Sweden (Appl. No. 15576/89), judgement (Plenary) of 20 March 1991 ECtHR, paras. 69-70.
[144] Aspichi Dehwari v. The Netherlands (Appl. No. 37014/97), report (Plenary) of 29 October 1998 EComHR, para. 61.
[145] Soering v. UK, supra fn. 143. para. 113; Einhorn v. France (Appl. No. 71555/01), decision (Third Section) of 16 October 2001 ECtHR, para 32; Ismoilov and Others v. Russia (Appl. No: 2947/06), judgement (Third Section) of 24 April 2008 ECtHR, para 156; Baysakov and Others v. Ukraine (Appl. No: 54131/08), judgement (Fifth Section) of 18 February 2010 ECtHR, para. 61.
[146] Nnyanzi v. UK (Appl. No. 21878/06), judgement (Fourth Section) of 8 April 2008 ECtHR, para. 72.
[147] UNHCR Executive Committee Conclusion No. 58, para. (f).
[148] Ibid., para. (g) .

With this overview of the non-refoulement obligation, let us now examine the journey of the irregular immigrants. The first scene is in the territorial waters of Cape Verde. As for the Cape Verdean authorities, the conventional non-refoulement is not applicable to of Cape Verdean irregular emigrants. It is the same with the Spanish authorities because the Cape Verdean immigrants are still inside of their country of origin. The situation is different for non-Cape Verdean migrants. In this case, Cape Verde also has the duty to protect those who are refuges (they are refugees as soon as the individuals fulfil the requirements of the Refugee Convention[149]) and come within the territory of Cape Verde. This is not the case with Spain, however, because although there is a general acceptance of non-refoulement at the frontiers, these non-Cape Verdean citizens are not yet at the frontier of Spain. Recall here that the House of Lords did not accept the idea of a "virtual frontier."[150] However, outside of the framework of the Refuge Convention, human rights treaties precluding refoulement do not require the refugee to be outside his or her country before a potential receiving State's obligations are engaged. Here, if an irregular immigrant is under the authority of Spain and fears torture or cruel, inhuman or degrading treatment or punishment, Spain would breach its obligation by refouling him to that territory where he fears such treatment. (However, this territory may be a country other than Cape Verde if the irregular immigrants are not from Cape Verde.)

The next scene is the high seas. First, within the Refugee Convention framework, Cape Verdean citizens are no longer in their country of origin. Nonetheless, applying the Refugee Convention extraterritorially is questionable. While the practice of States such as the United States,[151] Australia,[152] and United Kingdom[153] denies the extraterritorial application of the Convention, the legal literature is of the opposite opinion.[154] It is therefore doubtful

[149] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, Geneva, January 1992, para. 28.
[150] Roma Rights Case supra fn. 116, at para. 26 (Lord Bingham), para. 43 (Lord Steyn).
[151] Sale v. Haitian Centres Council 509 USSC 155 (1993), pp. 155, 156.
[152] MIMA v. Ibrahim, HCA 55 (16 November 2000), para. 136, Gummow J; MIMA v. Khawar, HCA 14 (11 April 2002), para. 42, McHugh and Gummow J.
[153] Roma Rights Case supra fn. 116, at para. 68 (Lord Hope of Craighead) and para. 17 (Lord Bingham of Cornhill).
[154] Goodwin-Gill, supra fn. 115, at p. 244; Cecilia Bailliet, The Tampa Case and Its Impact on Burden Sharing at Sea, Human Rights Quarterly 25 2003 (pp. 741-77), p. 751; Anthea Roberts, Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11, European Journal of International Law, 15 2004 (pp. 721-49), p. 745; Sara Debenedetti, Externalization of European Asylum and Migration Policies, RSCAS Working Paper 2006, at p. 6. (available at: http://www.eui.eu/RSCAS/Research/SchoolOnEuroMedMigration/2006pdfs/Paper%20Debenedetti%202006%20FINAL.pdf); G. S. Goodwin-Gill, The Haitian Refoulement Case: A Comment, International Journal of Refugee Law 6 1994 (pp. 103-109), p. 109; J. C. Hathaway, Rights of Refugees under International Law (Cambridge University Press, 2005), pp. 336, 341; Andreas Fischer-Lescano, supra fn. 77, at p. 266.; UNHCR,

whether Spain is duty-bound to apply non-refoulement in the sense of the Refugee Convention. The situation changes when it comes to the application of non-refoulement according to other human rights conventions. Here, both the ICCPR and the ECHR have extraterritorial aspects since they are applicable not only in the territory of the Contracting States but also in the case of an individual who is under their jurisdiction. Therefore, Spain is duty-bound not to refoule someone who faces torture or cruel, inhuman or degrading treatment or punishment.

Right to seek asylum

It is true that no international instrument expressly obligates States to grant asylum to persons fleeing persecution. Although Article 14 of the Universal Declaration of Human Rights (UDHR) contains the right to seek and enjoy asylum, the UDHR does not have a binding effect. Also, according to the European Parliament, the right of asylum is "only" a procedural right, that is to say it is a right to apply for asylum.[155]

In connection with the freedom of movement and the totality of rights protected by the UDHR and the ICCPR, however, there is an implied State obligation to respect the individual's right to leave his or her country in search of protection.[156] Therefore, if a State imposes barriers on individuals seeking to leave their own country[157] or to have access to asylum procedures, these barriers may constitute a breach of this obligation.[158] In addition, if a person leaves the State of his nationality and applies to the authorities of another State for asylum, whether at the frontier of the latter State or from within it, he should not be rejected or returned to the former State without appropriate enquiry into the persecution of which he claims to have a well-founded fear.[159]

In other words, States have no obligation to grant asylum to those who are seeking it but must guarantee them access to launch an application for asylum status. Refugee status itself is a fact: a person who fulfils the requirements of the Refugee Convention is a refugee immediately, whether or not recognised as such by States. One requirement is that the person be outside the country of his or her nationality (i.e., outside the country's territorial waters as

---

Advisory Opinion on the Exterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007), para. 24.

[155] Comments on the Charter of Fundamental Rights of the European Union, Art. 18. http://www.europarl.eu.int/comparl/libe/elsj/charter/art18/default_en.htm

[156] Guy S. Goodwin-Gill, supra fn.115, at p. 370.

[157] Roma Rights Case, supra fn. 116.

[158] Guy S. Goodwin-Gill, supra fn. 115, at p. 370.

[159] Roma Rights case, supra fn. 116, at para. 26 (Lord Bingham).

well[160]). Therefore, the right to seek asylum is relevant in cases where those who seek it are outside of the country of their nationality. Regarding the Spanish-Cape Verdean situation, the following can be said. In the territorial waters of Cape Verde, the Spanish authorities have the duty to accept asylum applications lodged by those who are not Cape Verdean nationals. On the high seas, Cape Verdean nationals may also seek and therefore apply for asylum. The same is true in the territorial waters of Spain. The Cape Verdean authorities are in a different situation; they have the duty to grant the right to seek asylum for those who are not Cape Verdeans.

Rights of children

States agree that the best interests of the children shall be the primary consideration in all actions of the State.[161] According to Article 2(1) of the Convention on the Rights of the Child, States shall apply the Convention extraterritorially in cases in which a child is within their jurisdiction.[162] In addition, the principle of children's best interests, read in conjunction with the Refugee Convention, means that States have a special duty when it comes to children. It is suggested that even in cases in which the Refugee Convention cannot be applied, the Convention on the Rights of the Child establishes the duty to protect them and to act according to their best interests.[163] States must observe this duty even outside of their own territories. This principle establishes a special protection in which children should be treated in such a way that the negative effects on their development and needs are avoided.[164] Naturally, the preferable solution is one in which children can be with their family. According to the principle of children's best interests, however, it may happen that an unaccompanied child's best interests dictate a separate protection. That would be the case, for example, when a child would be in danger if he or she were returned to his or her family.

It can be said that the principle of children's best interests is applicable everywhere, and the Spanish authorities are duty-bound to apply it in the territorial waters of Spain and Cape Verde as well as on the high seas. The same is true for the Cape Verdean authorities.

[160] Art. 2(1), UNCLOS.
[161] Art. 3, Convention on the Rights of the Child; entered into force on 2 September 1990; acceded by Cape Verde on 4 June 1992; ratified by Spain on 6 December 1990.
[162] Art. 2(1), Convention on the Rights of the Child; also Michal Gondek, supra fn. 82 at, pp. 115-118, 207.
[163] Guy S. Goodwin-Gill, supra fn. 115, at p. 131: "The welfare of the child, and the special protection and assistance which are due in accordance with international standards, prevail over the narrow concerns of refugee status."
[164] Ibid., p. 131.

CHAPTER FIVE
Interception

5.1 Meaning and legality of interception

In 2000, the UNHCR observed that there was no internationally accepted definition of interception.[165] Based on State practice, however, it is possible to find the cornerstones of the act. Thus, interception encompasses all measures applied by a State, outside its territory, in order to prevent, interrupt, or stop the movement of persons without the required documentation crossing international borders by land, air, or sea, and making their way to the country of prospective destination.[166] This description reveals one of the most important elements of interception: it occurs extra-territorially.[167] Interception may occur in the context of large-scale smuggling or trafficking of persons, as well as individuals travelling on their own without the assistance of criminal smugglers and traffickers.[168]

There are two forms of interception: "administrative" interception and "physical" interception. The former means that States deploy extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents.[169] A number of transit countries such as Cape Verde have also received financial and other assistance from prospective destination countries such as Spain in order to enable them to detect, detain, and remove persons suspected of having the intention to enter the country of destination in an irregular manner.[170]

This thesis will use the term "interception" to mean "physical" interception (also known as "interdiction"[171]). This form involves intercepting vessels suspected of carrying irregular migrants or asylum-seekers, either within the territorial waters of a State or on the high seas. Some countries such as Spain try to intercept boats used for the purpose of smuggling migrants or asylum-seekers as far away from their territorial waters as possible.

---

[165] UNHCR Executive Committee Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach UN doc. EC/50/SC/CRP.17 (9 June 2000), para. 10.
[166] Ibid.
[167] Barbara Miltner, Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception, Fordham International Law Journal, 30 2006 (pp. 75-125), p. 79.
[168] UNHCR Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, supra fn. 165, at para. 11.
[169] Ibid., para. 13.
[170] Ibid.
[171] Ibid., para. 12.

Once intercepted, passengers are disembarked either on dependent territories of the intercepting country or on the territory of a third country which approves their landing. In most instances, the aim is to return, without delay, all irregular passengers intercepted to their country of origin.[172] Physical interception therefore involves interference with vessels, usually in the maritime context, and may include boarding, inspection, seizure, and/or destruction.[173] Physical interception may also encompass "push-backs," a process through which those boats intercepted in the territorial waters of a State may be forcibly "escorted" back to the high seas to prevent disembarkation on the State's territory.[174] In 2003, the UNHCR Executive Committee (ExCom) added the following measures to its definition of interception: prevention of embarkation, prevention of further onward international travel or assertion of control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law and the person or persons do not have the required documentation or valid permission to enter.[175] The UNHCR ExCom added that these measures serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner.[176]

It should be stressed that there is a distinction between interception and rescue. In the latter case, persons are in distress at sea. The issue of distress at sea and the obligation of rescue at sea will be discussed in the last sub-chapter.

As for the second issue within this sub-chapter (i.e., the legality of interception), three scenes need to be examined. The first scene concerns the legality of interception measures by the Spanish authorities in the territorial waters of Spain or by the Cape Verdean authorities in the territorial waters of Cape Verde, respectively. The second scene relates to the legality of interception measures on the high seas. The third scene involves the legality of interception measures by the Spanish authorities in the territorial waters of Cape Verde.

1.)

The question is whether the Spanish or Cape Verdean authorities may lawfully prevent, interrupt or stop vessels of illegal immigrants within their own territorial waters according to the "definition" of interception discussed above. In other words, may the Spanish or Cape

[172] Ibid.
[173] Barbara Miltner, supra fn. 167, at p. 84.
[174] Robert L. Newmark, Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs, Washington University Law Quarterly 71 1993 (pp. 833-870), p. 847; Barbara Miltner, supra fn. 167, at p. 84.
[175] UNHCR Executive Committee Conclusion No. 97 (2003).
[176] Ibid.

Verdean authorities board, inspect, seize and/or destruct such vessels within their own territorial waters? At issue here is what Spain may do alone within its own territorial waters and what Cape Verde may do alone within its own territorial waters.

It should be pointed out that, although the 2000 UNHCR ExCom definition treats interception as an essentially extraterritorial act,[177] a State may intercept migrants within its own territorial waters too. In 2003, the ExCom included in its definition the prevention of embarkation and placed the responsibility primarily on the State within whose territorial waters the interception takes place.[178] On the basis of this definition, it can be concluded that interception may occur in a State's territorial waters as well.

It is important to note that irregular migration is a two-way traffic. One direction involves emmigrants wanting to leave (embark), while the other direction involves immigrants wanting to enter (disembark). While the former is included in the ExCom definition in 2003, the latter is connected with the "right to enter." As discussed earlier,[179] one may have the right to leave his or her own country other but States are not positively obligated to admit him or her. It is up to each sovereign State to decide who will be guaranteed entry. Interception within the territorial waters of a State can therefore be understood in these cases as a lawful means of border control. Nevertheless, the duty of non-refoulement cannot be put aside; this duty applies in a State's territorial waters and at its borders[180] too.

To conclude, both the Spanish and Cape Verdean authorities execute border control when they intercept those boats which try to embark[181] or disembark in their territories and act according to their "sovereign right." In addition, these authorities are not duty-bound to give entry to everyone. They are, however, duty-bound to respect the principle of non-refoulement.

2.)

The legitimacy of interception on the high seas is somewhat more complex as no State has sovereignty over the high seas[182] and the right to visit vessels is limited. Nonetheless, the flag State's authorities have the right to intercept vessels suspected of transporting irregular migrants. [183] A Non-flag State's authorities may also intercept vessels suspected of

[177] UNHCR Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, supra fn. 165, at para. 10.
[178] UNHCR Executive Committee, Conclusion No. 97 (2003).
[179] Chapter 4.2
[180] Guy S. Goodwin-Gil supra fn. 115, at p. 384.
[181] Although it is hard to imagine that irregular immigrants want to leave Spain, hypothetically, this situation cannot be excluded.
[182] Art. 89, UNCLOS.
[183] Art. 8(1), Palermo Protocol.

transporting irregular immigrants if the flag State authorises them to do.[184] When the flag State gives authorisation to another State in the form of an agreement or convention, the authorised State may visit and therefore intercept the vessels of the flag State on that basis. In addition, if the vessel does not have a flag, any State may visit it.[185]

If Spain or Cape Verde acts upon any of the aforementioned bases, it has the legitimacy to intercept vessels on the high seas within the meaning of the ExCom definitions.

3.)

In the territorial waters of Cape Verde, interception is carried out by Spanish border controllers. This is a separate issue from the first scenario, because Spain acts extraterritorially (as it was also stressed in the 2000 ExCom definition). To act legitimately, Spain needs Cape Verde's authorisation. Without it, Spain's interception operations would be illegitimate in the territorial waters of Cape Verde.[186] This authorisation comes in the form of a bilateral agreement concluded in 2007. Under this agreement, the Spanish authorities may intercept, visit, or capture vessels but remains under the direction of the Cape Verdean authorities.[187]

5.2 Means of interception

This thesis has so far considered the legal basis and legal framework of interception. It will now explore what States may do while they intercept vessels, on the assumption that they have the legal entitlement to do so.

During interceptions, States aim to suppress illegal acts by querying the master of the vessel, as well as stopping, boarding, inspecting and searching the vessel and, if necessary, seizing its cargo.[188] The use of force in such law-enforcement activities should not be disallowed.[189]

---

[184] Art. 8(2), Palermo Protocol.
[185] Art. 110(1)(d), UNCLOS.
[186] See also Eichmann incident, supra fn. 55.
[187] Art. 6(5), Spanish - Cape Verdean bilateral agreement.
[188] Wolf Heintschel von Heinegg, "Maritime Interception/Interdiction Operation," in Terry D. Gill and Dieter Fleck, eds., The Handbook of the International Law of Military Operations (Oxford University Press 2010), (pp. 375-393), p. 375.
[189] Efthymios Papastavridis, supra fn. 78, at p. 211.

Coastal States may adopt laws and regulations[190] criminalising smuggling. Pursuant to these laws and regulations, they may arrest persons, conduct investigations and temporarily detain the vessel if a crime has been committed on board during passage (i.e., passing through the territorial sea after leaving internal waters).[191] If the vessel passes through the territorial sea, however, criminal enforcement jurisdiction may be exercised only if, for example, the crime is of a kind to disturb the peace of the country or the good order of the territorial sea. In these cases, the coastal State may arrest or conduct investigation.[192]

Visit and search of vessels is usually exercised as follows.[193] If the commander determines that there are reasonable grounds for suspicion of engagement in any activity triggering the right of interception, the vessel will be contacted by radio on an internationally recognised frequency. If the vessel does not have communications equipment, contact must be established by use of other appropriate and available means. It is important that communication with the vessel is attempted in a manner or language easily comprehensible by the vessel's master or crew. The vessel may be asked to provide information about is nationality, origin, destination, cargo, or passengers. If the response proves insufficient for ruling out reasonable grounds for suspicion, the vessel may be ordered to stop and allow inspection of its documents on board. Depending on the respective legal basis, boarding may be exercised with or without the master's consent. As soon as the boarding team is on board, the commanding officer will inspect the vessel's documents. If those documents are insufficient or if other grounds for suspicion continue to exist, the boarding team may search the vessel and its cargo.

It may happen that the authorities have to use force during interception activities, for example, in order to enforce criminal law in their territorial waters or in cases in which they face armed resistance. The possibility of the latter cannot be excluded because it may very well be that human traffickers are armed. Naturally, considerations of humanity and rescue-at sea operations cannot logically involve the use of force.[194] Thus, the question remains whether and, if so, then to what extent State authorities are allowed to use force during interceptions.

The International Tribunal for the Law of the Sea addressed use of force in its judgement on the M/V Saiga (No. 2). The Tribunal found that international law requires that force be avoided as far as possible and that, in cases in which force is unavoidable, it not go

[190] Art. 21(1),UNCLOS.
[191] Art. 27(2), UNCLOS; Wolf Heintschel von Heinegg, supra fn. 188, at p. 378.
[192] Art. 27(1)(b), UNCLOS.
[193] Wolf Heintschel von Heinegg, supra fn. 188, at p. 391.
[194] Efthymios Papastavridis, supra fn. 78, at p. 214.

beyond what is reasonable and necessary in the circumstances. The Tribunal also held that considerations of humanity must apply in the law of the sea as they do in other areas of international law.[195] According to the Tribunal, force may be used as a last resort but, even then, "all efforts should be made to ensure that life is not endangered."[196] Use of force is therefore restricted to situations where armed resistance is encountered or where imminent threat to the lives of the arresting forces or third persons, or to the safety of their vessels, is encountered.[197]

In situations in which a vessel is ordered to stop and be visited and searched,[198] non-compliance with the order to stop may be answered by warning shots.[199] The extent of force used in these cases should be considered. This use should remain within the principles of proportionality and necessity. The proportionality principle requires the enforcing State to weigh the gravity of the offence against the value of human life.[200] In other words, the use of force is strictly limited to the degree that is necessary to overcome resistance against the exercise of an interception, a boarding, an inspection, or an order to proceed on a given course.[201] Even in situations of self-defence, the principles of necessity and proportionality are applicable. Where a vessel ordered to stop does not do so, the following steps need to be carried out according to the principle of proportionality.[202] The first shot may not be fired in the direction of the vessel. If the first warning shot remains unheeded, the second warning shot may be fired across the vessel's bow. If the vessel continues on its course, the enforcing ship is entitled to use incapacitating force, i.e., that degree of force which is necessary to prevent that vessel from escaping from the area.

5.3 Obligation to rescue at sea

[195] M/V SAIGA (No. 2) (Saint Vincent v. Guinea), judgement of 1 July 1999, International Tribunal for the Law of the Sea, para. 155.
[196] Ibid., para. 156; this was also confirmed in the Matter of an Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal 17 September 2007, para. 445, where the Arbitral Tribunal accepted the argument that "in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."
[197] Wolf Heintschel von Heinegg, supra fn. 188, at p. 392.
[198] Art. 8(2), Palermo Protocol.
[199] Wolf Heintschel von Heinegg, supra fn. 188, at p. 393.
[200] Efthymios Papastavridis, supra fn. 78, at p. 215.
[201] Wolf Heintschel von Heinegg, supra fn. 188, at p. 392.
[202] Ibid., p. 393.

This part of the thesis will explore the obligation to rescue at sea, the development of this practice through the years and the problematic issue of disembarking after a rescue operation. Rescue at sea refers to rendering assistance to any person found at sea in danger of being lost and proceeding with all possible speed to rescue any persons in distress.[203] Initially, the basic idea of rescuing assumed that persons in distress at sea want to go back to their own country as soon as possible.[204] This is not the case with irregular immigrants or asylum seekers. These individuals want to get to another State and start their new life, a practice that "other" States or receiving States such as Spain try to avoid. These receiving States often intercept overcrowded and unseaworthy vessels under the façade of a rescue operation and then disembark the travellers of these vessels at their starting point. Rescuing those irregular immigrants and asylum seekers who are in distress at sea and disembarking them afterwards are two separate issues. They are nevertheless connected in a way because there can be no rescue without disembarkation. We will examine these two issues in parallel and on the basis of their historical development, mindful of the fact that the humanitarian obligation to rescue at sea is undisputed while there are many uncertainties concerning disembarkation.

Besides the existing rule of rescue in the UNCLOS,[205] the UNHCR ExCom stressed in 1979 the humanitarian obligation of all coastal States to allow vessels in distress to seek haven (i.e., disembark) in their waters and to grant asylum or, at a minimum, to offer temporary refuge to persons on board wishing to seek asylum.[206] The UNHCR ExCom noted that those rescued at sea should normally be disembarked at the next port of call. Later, in 1981, the UNHCR ExCom reiterated its latter observation and added that this practice should also be applied in the case of asylum seekers rescued at sea.[207]

The 2001 Tampa incident revealed the difficulties of rescue operations.[208] In response, an Expert Roundtable[209] on rescue-at-sea was held in Lisbon in 2002. Amendments to the

---

[203] Art. 98, UNCLOS.
[204] Efthymios Papastavridis, supra fn. 78, at p. 204.
[205] Art. 98, UNCLOS: "The duty to render assistance".
[206] UNCHR Executive Committee Conclusion No. 15, para. (c).
[207] UNCHR Executive Committee Conclusion No. 23, para. 3; the rescue of asylum seekers was reaffirmed in ExCom Conclusion No. 38, para. (a); in ExCom Conclusion No. 34; and ExCom Conlusion No. 31.
[208] See BBC news: http://news.bbc.co.uk/2/hi/talking_point/1514960.stm Australia defended its non-acceptance of 433 Afghan asylum seekers and the boarding of M.V. Tampa on the basis of national sovereignty and security while Norway's view was based on Article 98 of UNCLOS, customary international law and generally accepted humanitarian standards. Their view was that Australia had an obligation to allow the rescued asylum seekers to be disembarked at the nearest port, Christmas Island.
[209] Lisbon Expert Roundtable dealt with "effective protection" in the context of secondary movements of asylumseekers and refugees. Held 9 and 10 December 2002, organised by the United Nations High Commissioner for Refugees and the Migration Policy Institute and hosted by the Luso-American Foundation for Development.

Safety of the Life at Sea Convention (SOLAS)[210] and to the International Convention on Maritime Search and Rescue (SAR)[211] in 2004[212] may also be mentioned.

The Expert Roundtable noted that coastal States are responsible for facilitating rescue by ensuring that the necessary enabling arrangements are in place, while the flag States are responsible for ensuring that ships' masters come to the assistance of people in distress at sea.[213] The Expert Roundtable further noted that the master has the right to expect the assistance of coastal States with facilitation and completion of the rescue, it being understood that completion occurs only when the rescued persons are landed somewhere or otherwise delivered to a safe place.[214] Participants also agreed that rescue-at-sea is, first and foremost, a humanitarian issue. This means that the fact of distress is the priority defining feature and that rescue and alleviation of distress are the first and absolute imperatives, regardless of who the people are and how they came to be where they are.[215] In other words, the Expert Roundtable moved away from the principle of "next port of call" and replaced it with a recommendation to increase shipmasters' discretion in determining the time and place for disembarkation.[216]

The 2004 amendment to the SOLAS imposed for the first time an obligation on States to "cooperate and coordinate" to ensure that ship's master is allowed to disembark rescued persons on a place of safety, irrespective of the nationality or status of those rescued and with minimal disruption to the ship's planned itinerary.[217] Further, neither the owner, the charterer, the company operating the ship nor any other person shall prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for the safety of life at sea and the protection of the marine environment.[218] Such decisions include matters pertaining to the rescue, the treatment and care of those rescued and where they should be landed.[219] According to the SAR, however, the primary authority for disembarkation decisions lies with the State responsible for search and rescue in the region

[210] Safety of Life at Sea Convention (hereinafter: SOLAS); entered into force on 25 May 1980; signed by Spain on 5 September 1978 and entered into force for Spain on 25 May 1980; acceded by Cape Verde on 28 March 1977 and entered into for Cape Verde on 25 May 1980.
[211] International Convention on Maritime Search and Rescue (hereinafter SAR); entered into force on 22 June 1985: acceded by Spain on 11 February 1993 and entered into force for Spain on 13 March 1993; acceded by Cape Verde on 4 July 2003 and entered into force for Cape Verde on 3 August 2003.
[212] The amendments were adopted in May 2004 and entered into force on 1 July 2006.
[213] UNHCR Rescue-at-Sea: Specific Aspects relating to the Protection of Asylum-Seekers and Refugees, Expert Roundtable, Lisbon, 25-26 March 2002 Summary of Discussions, 11 April 2002, para. 13.
[214] Ibid., para 6.
[215] Ibid., para 2.
[216] Ibid., paras 3, 5. and Barbara Miltner, supra fn. 167, at p. 107.
[217] Chapter V. Reg. 33(1), SOLAS and Art. 2(1)(10), SAR; also Efthymios Papastavridis, supra fn. 78, at p. 205.
[218] Chapter V. Art. 34(1), SOLAS.
[219] Guy S. Goodwin-Gill, supra fn. 115, at p. 283.

where the rescue occurs.[220] This means that the Rescue Co-ordination Centres[221] may designate on behalf of the assisting vessel where disembarkation will occur.[222]

Another problematic issue in cases of rescue at sea is that there is a growing trend towards characterising interceptions as rescue operations.[223] Here, there are two guidelines which can help differentiate between rescue operations and interceptions. One is a 2003 ExCom Conclusion which says that "when vessels respond to persons in distress at sea, they are not engaged in interception."[224] The other is the SAR definition on distress phase which states that distress occurrence is a "situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."[225]

Although the distinction should be made between interception and rescue, States such as Spain certainly classify some interception measures as rescue-at-sea operations in order to use SAR operational capacity for such activities[226] and to find out whether the passengers are illegal immigrants or possibly victims of human trafficking. Yet, rescue at sea is a basic humanitarian operation and should not be subject to the immigration policy of States such as Spain. Disembarkation should be decided according to the SOLAS and the SAR. If Spain were to see rescue operations as a humanitarian duty and not as one of the means of its migration control, then more rescued people would be taken to Spanish soil where their status as refugees, irregular immigrants, or beneficiaries of non-refoulement could be examined.

[220] Art. 3(1)(9), SAR.
[221] Annex 3 Chapter 1, Art. 1(3)(5), SAR Convention (Res. MSC. 70(69), adopted on 18 May 1998).
[222] Annex 5 Chapter 4, Art. 4(8)(5), SAR (Res. MSC 155(78), adopted on 20 May 2004).
[223] Barbara Miltner, supra fn. 167, at p. 111.
[224] UNCHR Executive Committee Conclusion No. 97.
[225] Annex 3 Chapter 1, Art. 1(3)(13), SAR (Res. MSC. 70(69), adopted on 18 May 1998).
[226] Statement made at the State Representatives' Meeting on Rescue at Sea and Maritime Interception in the Mediterranean, Chairman's Summary, 1, 23-24, Madrid, May 2006, as quoted by Barbara Miltner, supra fn. 167, at p. 111.

CHAPTER SIX

Summary and Conclusion

6.1 Summary

This thesis began by exploring Spain's interception practice. Having clarified legal terms such as jurisdiction, authority and responsibility, the thesis found that the term "jurisdiction" is used in two senses, namely in a public international law sense and in a human rights law sense. The examination of the Spanish-Cape Verdean bilateral agreement showed that Spain does not have jurisdiction in the public international law sense when it intercepts vessels in the territorial waters of Cape Verde. The situation is different from the human rights point of view, however. Here, Spain's jurisdiction within the meaning of Article 1 of the ECHR is established over the intercepted persons in the territorial waters of Cape Verde, on the high seas and in the territorial waters of Spain. Spain may, therefore, be held responsible for violations of the ECHR. The discussion of rights enjoyed by intercepted persons shows how their rights change while they travel. This thesis also focused on the means of interception used by border officials while they stop would-be irregular immigrants. While these are practical matters, one should bear in mind the distinction between interception and rescue operations.

6.2 Conclusion

In view of the foregoing, it becomes apparent that Spain endeavours to avoid having jurisdiction over those whom it intercepts and to avoid taking responsibility for them as a result. In particular, the Spanish-Cape Verdean bilateral agreement is formulated very carefully and shows an attempt to shift the responsibility towards Cape Verde. Spain's aim is to keep irregular immigrants as far from the borders of Spain as possible. Naturally, it is within Spain's sovereign decision as to who is allowed to cross its borders. In the meantime, however, it is doubtful whether the Spanish authorities manage to distinguish between those who are eligible for protection (e.g., refugee status and non-refoulement) and those who are

illegal migrants. This thesis shows Spain's (and also Cape Verde's) numerous duties during interception operations in order not to violate human rights.

It is important to emphasise, however, that there is a huge burden on Spain (and other Schengen border countries) to reduce the number of irregular immigrants entering the Schengen area. This burden should be shared among all Schengen States. The help of non-border States would be essential. Spain should allow more asylum seekers to enter and have assistance (money and manpower) from other Schengen States to conduct refugee status determination.

Bibliography

Books

Aleinikoff, Thomas Alexander, and Vincent Chétail, eds. *Migration and International Legal Norms* (T.M.C. Asser Press), 2003.

Cassese, Antonio. *International Law* (Oxford University Press, second edition), 2005.

Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), 2002.

Gondek, Michal. *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia), 2009.

Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law* (Oxford University Press), 2007.

Hathaway, James C., *Rights of Refugees under International Law* (Cambridge University Press), 2005.

Heintschel von Heinegg, Wolf. "Maritime Interception/Interdiction Operation," in Terry D. Gill and Dieter Fleck, eds., *The Handbook of the International Law of Military Operations* (Oxford University Press) 2010, pp. 375-393.

Mosler, Hermann. *The International Society as a Legal Community* (Sijhoff and Noordhof), 1980.

Ryan, Bernard, and Valsamis Mitsilegas, eds. *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers), 2010.

Ryngaert, Cedric. *Jurisdiction in International Law* (Oxford University Press), 2008.

Shaw, Malcolm N. *International Law* (Cambridge University Press, sixth edition), 2008.

Articles and Papers

Bailliet, Cecilia. *The Tampa Case and Its Impact on Burden Sharing at Sea*. Human Rights Quarterly, 25 2003 (pp. 741-777).

Debeneddit, Sara. *Externalization of European Asylum and Migration Policies*. Robert Schumann Centre for Advanced Studies Working Paper, 2006.

Fisher-Lescano, Andreas, Tillmann Löhr and Timo Tohidipur. *Border Controls at Sea: Requirements under International Human Rights and Refugee Law.* International Journal of Refugee Law, 21 2009 (pp. 256-296).

Gammeltoft-Hansen, Thomas. *The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean.* DIIS Working Paper no. 6, March 2008.

Goodwin-Gill, Guy S. *The Haitian Refoulement Case: A Comment.* International Journal of Refugee Law, 6 1994 (pp.103-109).

International Institute of Human Rights. *Strasbourg Declaration on the Right to Leave and Return, Meeting of Experts 26 November 1986.* The American Journal of International Law, 81 1987 (432-438).

King, Hugh. *The Extraterritorial Human Rights Obligations of States.* Human Rights Law Review, 9 2009 (pp. 521-556).

Miltner, Barbara. *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*. Fordham International Law Journal, 30 2006 (pp. 75-125).

Newmark, Robert L. *Non-refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*. Washington University Law Quarterly, 71 1993 (pp. 833-870).

Papastavridis, Efthymos. *Interception of Human Beings on the High Seas: a Contemporary Analysis under International Law*. Syracuse Journal of International Law and Commerce, 36 2009 (pp. 145-228).

Roberts, Anthea. *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*. European Journal of International Law, 15 2004 (pp. 721-749).

Sari, Aurel. *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases.* Human Rights Law Review, 8 2008 (pp. 150-170).

Judgements and Decisions

SS Lotus (France v. Turkey), PCIJ Reports, Series A, No 10 1927 PCIJ.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 26 November 1984 ICJ.

Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007 ICJ.

Prosecutor v. Tadic, IT-94-1, 15 July 1999 Appeals Chamber, ICTY.

Prosecutor v. Furundzija, IT-95-17/1-T, 21 July 2000 Trial Chamber, ICTY.

M/V SAIGA (No. 2) (Saint Vincent v. Guinea), 1 July 1999 International Tribunal for the Law of the Sea.

In the Matter of and Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal 17 September 2007.

Abdulaziz, Cabales and Balkandali v. United Kingdom (Appl. No. 9214/80, 9473/81, 9474/81), judgement (Plenary) of 28 May 1995 EComHR.

Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France Germany and Norway (Appl. No. 71412/01, 78166/01), judgement (Grand Chamber) of 2 May 2007 ECtHR.

Aspichi Dehwari v. The Netherlands (Appl. No. 37014/97), report (Plenary) of 29 October 1998 EComHR.

Baumann v. France (Appl. No. 33592/96), judgement (Third Section) of 22 May 2001 ECtHR.

Baysakov and Others v. Ukraine (Appl. No. 54131/08), judgement (Fifth Section) of 18 Febrary 2010 ECtHR.

Cruz Varas v. Sweden (Appl. No. 15576/89), judgement (Plenary) of 20 March 1991 ECtHR.

Cyprus v. Turkey (Appl. No. 6780/74; 6950/75), decision of 26 May 1978 EComHR.

Cyprus v. Turkey (Appl. No. 25781/94), judgment (Grand Chamber) of 10 May 2001 ECtHR.

Einhorn v. France (Appl. No. 71555/01), decision (Third Section) of 16 October 2001 ECtHR.

Greek case: Denmark v. Greece (App. No. 3321/67); Norway v. Greece (App. No. 3322/67); Sweden v. Greece (App. No. 3323/67); The Netherlands v. Greece (App. No. 3344/67), report of 5 November 1969 EComHR.

Ilascu and Others v. Moldova and Russia (Appl. No. 48787/99), judgement (Grand Chamber) of 8 July 2004 ECtHR.

Isaak and Others v. Turkey (Appl. No. 44587/98), decision (Third Section) of 28 September 2006 ECtHR.

Ismoilov and Others v. Russia (Appl. No. 2947/06), judgement (Third Section) of 24 April 2008 ECtHR.

Issa and Others v. Turkey (App. No. 31821/96), judgment (Second Section) of 16 November 2004 ECtHR.

Loizidou v. Turkey (Appl. No. 15318/89), judgement (Grand Chamber) of 18 December 1996 ECtHR.

Medvedyev and Others v. France (Appl. No. 3394/03), judgment (Grand Chamber) of 29 March 2010 ECtHR.

Mohammed Ben El Mahi and Others v. Denmark (Appl. No. 5853/06), decision (Fifth Section) of 11 December 2006 ECtHR.

Napijalo v. Croatia (Appl. No. 66485/01), judgement (First Section) of 13 November 2003 ECtHR.

Nnyanzi v. United Kingdom (Appl. No. 21878/06), judgement (Fourth Section) of 8 April 2008 ECtHR.

Öcalan v. Turkey (Appl. No. 46221/99), judgement (First Section) of 12 March 2003 ECtHR.

Öcalan v. Turkey (Appl. No. 46221/99), judgement (Grand Chamber) of 12 May 2005 ECtHR.

Pad and Others v. Turkey (Appl. No. 60167/00), decision (Third Section) of 28 June 2007 ECtHR.

Pretty v. United Kingdom (Appl. No. 2346/02), judgement (Fourth Section) of 29 April 2002 EctHR.

Silver and Others v. United Kingdom (Appl. No: 5947/72, 6205/73, 7052/75, 7061675, 7107/75, 7113/75, 7135/75), report (Plenary) of 11 October 1980 EComHR.

Soering v. United Kingdom (Appl. No. 14038/88), judgement (Plenary) of 7 July 1989 ECtHR.

Xhavara and fifteen v. Italy and Albania (Appl. No. 3947/98), decision (Fourth Section) of 11 January 2001 ECtHR.

W. M. v. Denmark (Appl. No. 17392/90), decision of 14 October 1992 EComHR.

Hamdan v. Rumsfeld, 548 USSC 557 (2006).

Rasul v. Bush, 542 USSC 466 (2004).

Sale v. Haitian Centres Council, 509 USSC 155 (1993).

Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex Parte Pinochet, 24 March 1999 UKHL.

Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), 9 December 2004 UKHL 55.

Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant) Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), 17 June 2004 UKHL 26.

MIMA v. Ibrahim, 16 November 2000 HCA 55.

MIMA v. Khawar, 11 April 2002 HCA 14.

Treaties, Declarations and Statutes

Acuerdo entre el Reino de España y la República de Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, 21 February 2008.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

Convention on the Rights of the Child, 20 November 1989.

Convention relating to the Status of Refugees, 25 July 1951.

European Convention for the Protection of Human Rights and Fundamental Freedom, 4 November 1950.

International Covenant on Civil and Political Rights, 16 December 1996.

International Convention on Maritime Search and Rescue, 27 April 1979.

Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde, 21 May 2008.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, 15 November 2000.

Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedom, Amending the Control System of the Convention, 13 May 2004.

Safety of Life at Sea Convention, 1 November 1974.

United Nations Convention on the Law of the Sea, 10 December 1982.

Vienna Convention on the Law of Treaties, 25 May 1969.

United Nations Resolutions and Documents

UN Document S/4336, Letter dated 15 June 1960 from the Representative of Argentina Addressed to the President of the Security Council.

Security Council Resolution 138 (1960), Question relating to the case of Adolf Eichmann (23 June 1960).

Human Rights Committee, General Comment No. 27, Freedom of Movement (2 November 1999).

Human Rights Committee, General Comment No. 15, Position of Aliens under the Covenant (11 April 1986).

Human Rights Committee, General Comment No. 18, Non-Discrimination (10 November 1989).

UNHCR, Advisory Opinion on the Exterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007).

UNHCR, Rescue-at-Sea: Specific Aspects relating to the Protection of Asylum-Seekers and Refugees, Expert Roundtable, Lisbon, 25-26 March 2002 Summary of Discussions (11 April 2002).

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1 January 1992).

UNHCR Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach (9 June 2000).

UNHCR Executive Committee, Conclusion No. 15 (1979).

UNHCR Executive Committee, Conclusion No. 23 (1981).

UNHCR Executive Committee, Conclusion No. 31 (1983).

UNHCR Executive Committee, Conclusion No. 34 (1984).

UNHCR Executive Committee, Conclusion No. 38 (1985).

UNHCR Executive Committee, Conclusion No. 58 (1989).

UNHCR Executive Committee, Conclusion No. 97 (2003).

European Union Regulations

EC Regulation 863/2007.

Council Regulation 2007/2004.

Internet Sources

Spanish Ministry of the Interior, "Balance de la lucha contra la immigración illegal 2007", 9 January 2008, and "Balance de la lucha contra la immigración illegal 2008", 12 January 2009: http://www.mir.es/DGRIS/Balances/

FRONTEX news release on HERA operation: http://www.frontex.europa.eu/newsroom/news_releases/art8.html

Comment on the Charter of Fundamental Rights of the European Union (Art. 18, Right to Asylum) by the Committee on Citizens' Freedom and Rights, Justice and Home Affairs: http://www.europarl.eu.int/comparl/libe/elsj/charter/art18/default_en.htm

BBC News 4 September 2001, Refugee ship: Who should take responsibility? http://news.bbc.co.uk/2/hi/talking_point/1514960.stm